NO. 20566

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES EMANUEL WHITE and
JOHN LEWIS

Appellant

vs.

UNITED STATES OF AMERICA

Appellee

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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NO. 20566

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I.

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant John Lewis to be guilty of the first three counts of a five-count indictment and adjuding appellant Charles Emanuel White to be guilty of Count One only of the same five-count indictment, following trial by jury. (C.T. 50, 51).

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 1407 and 3231, and Title 21, United States Code, Section 176(a). Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II.

STATEMENT OF THE CASE

Appellant John Lewis was charged in Counts One, Two and Three and Charles Emanuel White was charged in Counts One and Four of a five-count indictment returned by the Federal Grand Jury for the Southern District of California, Southern Division, at San Diego, California, on January 20, 1965.

The first count alleged that appellant White, and Appellant Lewis, Edna Louise Nesmith, Swindell McNeal and others unknown conspired to import narcotic drugs into the United States from Mexico, contrary to Title 21, United States Code, Section 173 (C.T. 2). In furtherance of the conspiracy three overt acts were alleged.

The second and third count alleged that Swindell McNeal knowingly imported twenty seven ounces of Heroin and one-half ounce of Cocaine respectively into the United States from Mexico, contrary to Title 21, United States Code, Section 173, and further alleges that John Lewis knowingly aided and abetted the commission of the offense (C.T.2).

Count Four alleged that Edna Louise Nesmith knowingly imported four grams of Heroin and one gram of Cocaine into the United States from Mexico, contrary to Title 21, United States Code, Section 173, and further alleges that appellant Charles Emanuel White knowingly aided and abetted the commission of the aforesaid offense (C.T. 2).

1/ "C. T." means Clerk's Transcript.

Count Five alleged that Edna Louise Nesmith, with intent to defraud the United States, knowingly smuggled one marijuana cigarette into the United States from Mexico, and further alleges that appellant Charles Emanuel White knowingly aided and abetted the commission of the aforesaid offense. (C.T. 2)

Jury trial of appellants John Lewis and Charles Emanuel White commenced on May 4, 1965, before United States District Judge Fred Kunzel, on counts One through Four only. On May 7, 1965, appellant John Lewis was found guilty as charged in Counts One, Two and Three, (C.T. 50), while appellant Charles Emanuel White was found guilty of Count One only. (C.T.51). Judgment of acquittal as to Count Four was granted by Judge Kunzel after the close of the trial prior to charging the jury. (R.T. 361).

Thereafter, on May 28, 1965, appellant White was committed to the custody of the Attorney General for twenty years and fined the sum of $20,000. on Count One. (C.T. 55). On the same date, appellant Lewis was sentenced to twenty years and fined the sum of $20,000. on each of counts One, Two and Three, with the period of confinement only to run concurrent and the fine to run consecutive, making the total sentence twenty years and a fine of $60,000. as to appellant Lewis. (C.T. 56).

Appellants White and Lewis subsequently filed a notice of appeal on June 4, 1965. (C.T. 57, 59).

2/ "R.T." means Reporter's Transcript.

III.

ERROR SPECIFIED

The errors specified by appellant are paraphrased as follows:

A. That the indictment was defective.

B. That there was an illegal search and seizure.

C. That there was a violation of the due process clause of the Constitution.

D. That inadmissible prejudicial hearsay evidence was admitted.

E. That the Prosecutor was guilty of misconduct through prejudicial statements in the argument.

F. That the jury was not properly instructed.

G. That evidence admitted in violation of the rules laid down in the cases of Escobedo, Massiah and Miranda.

IV.

STATEMENT OF THE FACTS

On November 8, 1964 at 7:00 P.M., appellant Charles Emanuel White entered the United States at San Ysidro, California, coming from Tijuana, Mexico (R.T. 60). He was driving an automobile he had rented at the Los Angeles Airport (R.T. 65). His passenger was Edna Louise Nesmith (R.T. 65, 221). He appeared to Inspector Collinsworth to be "drinking or possibly was under the influence of drugs". A bottle of cough syrup containing codeine was in the glove compartment (R.T. 60) and Miss Nesmith had a package containing eight small cellophane bags of Heroin and two tinfoil wrapped packages of Cocaine. (R.T. 90, 218-219). White had given her these packages just

after crossing the border and upon being referred to secondary for further search (R.T. 219, 257, 260). Appellant White had a similar piece of tinfoil in his pocket (R.T. 99).

In appellant White's Mexican briefcase in the trunk was $6400.00 (R.T. 80, 87). Appellant White was certified as addicted to and under the influence of Heroin by Doctor Paul R. Salerno, M.C. (R.T. 304-306). Edna Nesmith appeared to Doctor Salerno to be a user and under the influence of Cocaine (R.T. 307-308). Sniffing of Cocaine was admitted to by Nesmith, (R.T. 261, 278).

Under the windshield wiper of the rented car driven by appellant White, was ticket #2067 from the Foreign Club Parking Lot in Tijuana (R.T. 69, 80). White had a corresponding stub in his pocket. Appellant White also had a copy of a Hertz rental agreement in his pocket showing a New York address and a $50.00 deposit having been made on the car. (R.T. 102). White also had two airplane tickets on his person in the name of Miss E. Nesbitt and J. Smaltz (R.T. 99).

Nesmith had a telegram on her person sent from Detroit, saying in effect that her brother was ill and to come at once (R.T. 98).

An hour later the same date, Swindell McNeal entered the United States alone from Tijuana, Mexico, at the same Port of Entry at San Ysidro, California, driving an automobile (R.T. 64) he had rented at the San Diego Airport (R.T. 19, 132). Under the rear seat was found twenty-seven packages containing 23.6 ounces of Heroin and approximately one-half ounce of Cocaine. These

packages were found under the rear seat in two blue bags (R.T. 67, 68).

McNeal had departed from New York with appellant John Lewis the previous evening (Nov. 7, 1964) at 6:00 P.M., by plane for Detroit (R.T. 122).

McNeal was a presser in a cleaning plant and, in addition, as an agent he was supposed to get 10% of a couple of acts in partners with another (R.T. 187).

He began driving Lewis around (R. T. 129) and Lewis told him two weeks before to be ready for a trip to California (R.T. 119). On the morning of November 7, 1964, (R.T. 116, 117) Lewis told McNeal to get ready (R.T. 116, 117). He had only pocket change. (R.T. 133). Lewis gave him some money (R.T. 134).

They went to the New York Airport in Lewis' rented car where he turned the car in. (R.T. 123). Lewis bought tickets for them to Detroit, Michigan. Lewis rented a car to use in Detroit (R.T. 124). They stayed at 5957 Bush Street with Lewis' wife and daughter or step-daughter. Lewis made phone calls in McNeals' presence. One conversation was "you know I have a 5:00 p.m appointment with somebody. Every time there is a messup." (R.T. 125, 126). He received a phone call where McNeal overheard Lewis say "Why can't you get a flight. There's a flight at all times of night." (R.T. 128).

The next morning, they left for Chicago, Illinois, with tickets Lewis purchased for them. They then flew from Chicago to Los Angeles where Lewis rented a car (R.T. 131) at Avis on a credit card at 12:12 P.M., using an address in Dallas, Texas. (R.T. 19).

Lewis bought a pair of pliers and disconnected the speedometer on the

rented car (R.T. 132). They proceeded to the San Diego Airport where Lewis gave $50.00 to rent a car at Avis. (R.T. 132). McNeal rented a car at Avis at 3:36 P.M. (R.T. 23-27).

Lewis had rented cars there before. Ann Allison of Avis remembered him since she was also from Texas (R.T. 30).

Lewis and McNeal went to the Foreign Club Parking Lot in Tijuana, Mexico. (R.T. 135, 33, 40). Lewis left and returned twice. (R.T. 137). The Foreign Club parking lot ticket #2059 was placed on the windshield and McNeal had the stub in his pocket (R.T. 16) together with the Avis rental agreement showing his employment as Salaam Music Company, New York, N.Y. There were 25 parking tickets to a package at the Foreign Club Parking Lot (R.T. 43).

McNeal saw Otis Johnson give John Lewis $4,500. in his apartment in New York during the week before their arrest (R.T. 144, 146).

Appellant White told McNeal at the jail that he was to meet John Lewis (R.T. 161).

Appellant Lewis came back to the Foreign Club Parking Lot, and awakened McNeal where he was sleeping in the car, "bawled him out" for not being ready, then guided McNeal up into the hills where he transferred the Heroin and Cocaine from his car to the automobile driven by McNeal (R.T. 138). He ordered McNeal to follow him until they neared the border, then McNeal was to proceed ahead. (R.T. 139). McNeal drove ahead and at the border, about three cars got between them, but not directly behind him (R.T. 140).

McNeal was then found with the narcotics in the car (R.T. 67, 68). Lewis was arrested in Detroit near where his wife lives on January 18, 1965. (R.T. 287).

Appellant White and Nesmith were driven to the Airport by White's brother-in-law, Otis Johnson (R.T. 221, 222). On the way, White told Johnson he hoped John would be there. (R.T. 247).

Before they departed, Nesmith received a telegram from Detroit addressed to Nesmith saying her brother was ill. Her brother was not ill. White told Nesmith that John Lewis arranged for the telegram to be sent. (R.T. 227-230).

Appellant White bought the tickets under the names of E. Nesbitt and J. Smaltz. They missed the 10:00 o'clock plane and left at 12:00 noon (R.T. 230). Appellant White was given the money ($6,400.00) by Otis Johnson and Otis told White somebody else was to bring something back (R.T. 234). The money was placed in the Mexican briefcase under a shirt and tie (R.T. 249).

They arrived in Los Angeles at 3:30 or 4:00 P.M. (R.T. 251). Appellant White rented a car and drove fast and straight to the Foreign Club Parking Lot in Tijuana (R.T. 231). He went into the bar, returning shortly and said "I missed him."

Appellant White wanted to provide Nesmith's lawyer (R.T. 246) while Lewis arranged for McNeal's lawyer and tried to get him to use the same lawyer as Lewis had. (R.T. 171).

Appellant Lewis prepared a story in which McNeal would try to place all the blame on appellant White (R.T. 164, 168-169), and said he would

rehearse him over and over (R.T. 169) Lewis tells McNeal, "you've got a clean record, you'll come out Scot-free." (R.T. 164).

V.

ARGUMENT

A. THE INDICTMENT IS NOT DEFECTIVE.

1. Alleged Formal Defects do not Determine the Sufficiency of Indictments.

The sufficiency of an indictment is to be determined on the basis of practical rather than technical considerations. Medrano v. United States, (9th Cir. 1960)

> "the true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently appraises the defendant of what he must be prepared to meet, and in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction."
> Hagner v. United States, 285 N. S. 427 (1932)
> Sterling v. United States, 333, F.2d 443 (9th Cir. 1964)
> Heaton v. United States, 353 F.2d 288 (9th Cir. 1965)

It is sufficient if the indictment alleges the offense substantially in the words of the statute, where the statute sets forth all the essential elements of the crime. If the indictment alleges an offense, and identifies

the particular conduct upon which the charge is based to the extent necessary to protect appellant from double jeopardy, and tells him what he must be prepared to meet, it is sufficient.

Rivera v. United States, 318 F.2d 606 (9th Cir. 1965)

2. The Indictment was Clearly Sufficient to Charge a Conspiracy.

" In an indictment for conspiracy to commit an offense in which the conspiracy is the gist of the crime . . . it is not necessary to allege with technical precision all the elements essential to the commission of the offense which is the object of the conspiracy . . . . in charging such a conspiracy certainty to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is necessary."

Wong Tai v. United States, 273 U. S. 77 (1927)

Williamson v. United States, 310 F.2d 192 (9th Cir. 1962)

Appellant alleges that the indictment was defective because it did not allege that he had knowledge that the narcotics were imported "contrary to law."

Title 21, Section 174 of the United States Code is applicable only to knowing transactions in narcotic drugs, knowingly imported contrary to law. Appellants could hardly avoid knowing from the indictment that a charge of violating this section was a charge that he had acted contrary to law, where the alleged offenses involve illegal importation.

Fiano v. United States, 291 F.2d 113 (9th Cir. 1961)

Under Section 174 of Title 21, proof of mere possession permits a jury to infer knowledge of illegal importation, and a finding of such knowledge is practically required when possession of Heroin is shown.

Stein v. United States, 313 F.2d 518 (9th Cir. 1962)

Count One of the indictment in the instant appeal is substantially identical with the count upheld in the Stein case, supra. It was held in that case at 520 that the count was sufficient in that all of the essential elements were either alleged or necessarily implied.

3. The Ninth Circuit has Specifically Rejected two cases Relied Upon by Appellant.

In Calhoun v. United States, 257 F.2d 673 (7th Cir. 1938), and Robinson v. United States, 263 F.2d 911 (10th Cir. 1959), both cited by appellant at page 7 of his brief, have been specifically rejected by the 9th Circuit as being in conflict with the modern views of the nature and purpose of an indictment, and as being contrary to the rule laid down by the United States Supreme Court in Wong Tai v. United States, supra., and as discussed by the 9th Circuit cases of Williamson v. United States, supra. and Medrano v. United States, supra. It is interesting to note that these latter involved violations of Title 21, Section 174, United States Code, and indictments similar to that in the instant case. In Calhoun, supra, the petitioner claimed a defect in the indictment where the unlawfulness of the knowing

importation was not alleged, whereas in Robinson, supra, the claimed defect was failure to allege knowledge. See Stein v. United States, 313 F. 2d 518 (9th Cir. 1962) and Palomino v. United States, 318 F.2d 613 (9th Cir. 1963). The Palomino case would seem to directly control the question of the alleged insufficiency of the indictment in this appeal. In that case, the facts were substantially similar, the prosecution was under the same statute, and the indictment challengenged was phrased in terms of the statute as here, without specifically alleging that the narcotic drug was imported contrary to law, or that Palomino knew of such illegal importation.

At page 615 the Court said

"on the authority of Medrano v. United States, 9 Cir. 285 F.2d 23, 26, we conclude that such an indictment is not fatally defective... The sufficiency of an indictment is to be determine on the basis of practical rather than technical considerations, and it is not the law that to charge conspiracy to commit an offense, all the elements be alleged . ."

Fiano v. United States, 291 F.2d 113 (9th Cir. 1961).

Here all essential elements were either alleged or are necessarily to be implied from what was set forth in the statute itself. Appellant was at all times represented by competent and experienced counsel, and there is no allegation that appellant was actually mislead or prejudiced by the language used.

B. NO EVIDENCE WAS ADMITTED FROM AN ILLEGAL SEARCH AND SEIZURE.

Appellant Lewis apparently complains of a search and seizure by local officers of his apartment in New York.

This is a moot question, since no evidence was introduced that came from his apartment in New York.

Appellant points to no place in the record that even hints any such evidence was used.

See United States v. Wilson, 368 F.2d 842 (2nd Cir. 1966).

C. THERE WAS NO VIOLATION OF DUE PROCESS.

Appellants also argue the prosecution knowingly used false testimony or somehow permitted such testimony to be used. Again appellant points to no specific record where the purported false testimony appears.

Appellant Lewis is apparently still concerned about an alleged seizure of private records and documents from his apartment in New York, that prevented him from defending his case. He further "wildly" alleges these papers were not produced upon demand by the United States Attorney.

Again, there is no record of such papers being seized and no record of any demand on the United States Attorney.

Further, if they are to be used only for the purpose represented, that is just to show appellant Lewis and McNeal in their proper perspective, the relevance would be doubtful.

D. NO ADMISSIBLE EVIDENCE WAS ADMITTED.

1. The Hearsay Testimony of McNeal and Nesmith Concerning White's and Lewis' Statements to them were Limited in Application to the Declarant by the Trial Court's Instructions.

Relevant declarations or admissions of a conspirator made in the absence of the co-conspirator, and not in furtherance of the conspiracy, may be admissible in a trial for conspiracy as against the declarant to prove declarant's participation. The Court must make it clear at the time of admission and by it's instructions that the evidence is limited to the declarant only.

Lutwak v. United States, 344 U. S. 604 (1952)

Each defendant must be connected with the alleged conspiracy by evidence independent of the statements of co-conspirators before the latter are admissible against him.

Hansen v. United States, 326 F.2d 152, 155 (9th Cir. 1963)

After the prima facie showing of conspiracy and concert of action, it is proper to admit testimony concerning conversations of a witness with a co-conspirator outside the presence of the defendant.

Shibley v. United States, 237 F.2d 327(9th Cir. 1956)

Everty act or declaration of each member of a conspiracy done or made in furtherance of said conspiracy is considered the act and declaration of all the conspirators and is evidence against each of them.

Barrett v. United States, 171 F.2d 721, 722 (9th Cir. 1949)

The co-conspirator's assertion doctrine has developed as a reasonable extension of the rule excepting admissions of a party from the hearsay prohibitions

> "Declarations of one conpirator may be used against the other conspirator not present on the theory that the declarant is the agent of the other, and the admissions of one are admissible against both under a standard exception to the hearsay rule applicable to the statements of a party."

quoting Lutwak v. United States, supra at p. 617. Such assertions constitute vicarious admissions chargeable against all conspirators.

Wolcher v. United States, 233 F.2d 748, 750 (9th Cir. 1956)

For a co-conspirator's declaration to avoid being classed as hearsay three prerequisites must be met:

1) The declaration must be in furtherance of the conspiracy;

2) it must have been made during the pendency of the conspiracy;

3) there must be independent proof of the existence of the conspiracy and of the connection of the declarant and defendant with it.

Carlo v. United States, 314 F.2d 718, 735 (9th Cir. 1963)

All testimony at any trial relating to prior statements or acts is given subsequent to any alleged conspiracy. But this alone does not make it inadmissible. So long as the testimony relates to events occuring prior to termination of the conspiracy, it is fundamental that the testimony of one conspirator is admissible as to the statements of all the conspirators where

it relates to communications made during and in the course of the conspiracy.

Murray v. United States, 250 F.2d 489, 491 (9th Cir. 1957)

The rule is well established that the declarations of a conspirator may be used against another conspirator, not present, on the theory that the declarant is the agent of the other, and the admissions of one are admissible against both under a standard exception to the hearsay rule.

United States v. Accardi, 342 F.2d 697, 700 (2nd Cir. 1965)

Lutwak v. United States, 344 U. S. at p. 617

Such declarations can be used against the co-conspirator only when made in furtherance of the conspiracy.

The jury was periodically instructed throughout the trial as to the foregoing limitations and then properly instructed on the law of conspiracy at the close of the trial. (R.T. 388-393). The hearsay portion of the instruction clearly sets forth the law on this point. (R.T. 392-393).

In the case at hand, it is clear that the Court was proceeding with caution. Judge Kunzel told the jury "you must view with caution any testimony concerning a statement supposedly made outside the Courtroom by a defendant." (R.T. 381). The Court also instructed on witnesses who have "self-interest" or who are "accomplices". (R.T. 383).

E. THE PROSECUTOR WAS NOT GUILTY OF MISCONDUCT THROUGH PREJUDICIAL STATEMENTS IN THE ARGUMENT.

In looking over the argument for the government, it appears to consist of approximately 33 pages. The only statement of all these mentioned by

appellants that appear worthy of consideration in this category is the statement "the government knows what the truth is." (R.T. 367).

Taken out of context, it has the appearance of an unfortunate utterance but taken in its intended light of emphasizing the truthfulness of McNeal and punishment for perjury if he should be found lying, while not a statement that would inspire pride of authorship, it is not so prejudicial as to require reversal.

The statement is a very small part of a rather lengthy argument. The statement was immediately withdrawn and the jury instructed to disregard the remark. The remaining portion of the argument appears to be supported by the evidence. The Court also instructed the jury that statements and arguments of counsel are not evidence. (R.T. 378, 381).

The jury was told by appellee's counsel that "you are the sole judge of the facts, so if I misquote any of the evidence, it is as you find it to be." (R.T. 323).

F. THE JURY WAS PROPERLY INSTRUCTED ON CIRCUMSTANTIAL EVIDENCE.

Appellant contends (at page 37 of appellant's brief) that the Trial Court erred in not instructing the jury that if circumstantial evidence can be reconciled with either the theory of innocence or the theory of guilt, the theory of innocence must be adopted. In other words, he contends that the proper instruction must state that the government cannot convict on circumstantial evidence unless it excludes every reasonable hypothesis other than that of

guilt.

This is not the law as enunciated by the United States Supreme Court, or as followed by the Ninth Circuit. The leading case is Holland v. United States, 348 U. S. 121 (1954). In that case, a similar instruction was requested by the defense and rejected. The court, in upholding the tenth Circuit's rulings, said at page 139,

> "the better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect. Circumstantial evidence in this respect is intinsically no different from testimonial evidence . . . . In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference in both the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more."

This is the position of the Ninth Circuit.

See Strangway v. United States, 312 F.2d 283 (9th Cir. 1962) cert. denied, 373, U. S. 903 (1963).

Appellant does not contend that improper instruction was given the jury concerning reasonable doubt, and as can be seen at pages 377 and 378 of the Reporter's Transcript, such instruction was fully given. Further, the Court properly discussed circumstantial evidence and its relationship to

reasonable doubt in clear language such as that approved in Holland, supra.

The instruction on possession was offered by counsel for the government (C.T.10) and was objected to by appellant White's counsel. (R.T.299,300

The Court refused to give the instruction and no further objection was raised by either counsel (R.T. 321).

On the facts in this case there is no plain error.

Appellant's remaining argument on instructions appears to carry little merit.

G. NO EVIDENCE WAS ADMITTED IN VIOLATION OF THE RULES LAID DOWN IN ESCOBEDO, MASSIAH, AND MIRANDA.

Appellant contends that his rights under the Fourth Amendment, allowing exclusion of evidence obtained by an illegal search and seizure, were violated. There is nothing in the record to substantiate this claim. Appellant bases his contention on the fact that evidence of a conversation between appellant Lewis and McNeal was admitted at trial. The conversation took place in Lewis' apartment in New York, after McNeal had been arrested, and later released. In support of his contention that this evidence was illegally obtained, petitioner cites the case of Silverman v. United States, 365 U. S. 505 (1960), which held that statements overheard by an officer at a time when he was trespassing upon defendant's premises, must be excluded under the Fourt Amendment.

The facts of that case are clearly distinquishable from the appeal at hand. In Silverman, supra, the officers committed a physical trespass by

inserting a spike mike into defendant's wall. In the instant case, however, there was no trespass at all. McNeal was freely admitted to the premises by his associate, Lewis. The Court in Silverman specifically limited its holding to cases of actual trespass.

Next, appellant seeks to find a violation of the Sixth Amendment right to counsel in this case, alleging that it is parallel to Massiah v. United States, 377 U. S. 201 (1963). In Massiah, the defendant was arrested, then released on bail. While he was out on bail, the authorities surreptitiously obtained incriminating statements from him. This was held to be a violation of Massiah's right to counsel, as he had already been indicted. McNeal was not sent to Lewis's apartment by officers. In the instant case, appellant Lewis had not yet been arrested, indicted, or in any way deprived of his freedom of movement, at the time he made the statements. He was merely a suspect.

The Trial Court considered Massiah as inapplicable (R.T. 157). Appellant admits that this case will not fit within the rule of Massiah, but attempts to apply it by analogy by the further step of grafting on a mistaken interpretation of Escobedo v. Illinois, 378 U. S. 478 (1964). It is true that Escobedo broadened the protection afforded by Massiah, but by no stretch of the imagination can that case be given the interpretation sought by appellant. Petitioner contends that the right to counsel should extend to appellant Lewis because the investigation had begun to "focus" upon him. It is true that under Escobedo the right to counsel may attach before indictment. It attaches

when a police investigation is no longer a general inquiry, but has begun to focus on a particular suspect, in police custody. What appellant fails to consider is the final element of custody, which is indispensible even under Escobedo. It is clear that Lewis was not and had not been in custody at the time he made the statements admitted into evidence.

Appellant makes a final attempt to find a constitutional violation when he alleges that Lewis was denied his right under the Fifth Amendment not to incriminate himself. In support thereof, appellant cites Miranda v. Arizona, 384 U. S. 436 (1966). Petitioner claims that Lewis was denied this right because he was not warned of his right to silence prior to giving the incriminating statements in his apartment. This contention can be easily disposed of on two grounds.

First, Miranda, like Escobedo, requires more than the focusing of the investigation on a particular suspect. It requires that the suspect be in custody or be deprived of his freedom of action. Clearly, that was not the situation in this case.

Second, the rules established in Miranda are not to be applied retroactively to cases where trial began before the decision in Miranda. This was such a case.

Pembrook v. Wilson, 370 F.2d 37 (9th Cir. 1966)

Spigner v. United States, 369 F.2d 686 (9th Cir. 1966)

Collins v. Wilson, 368 F.2d 995 (9th Cir. 1966).

Also, the record is clear that McNeal was not an agent of the government.

VI.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the jury verdict of guilty in the Court below should be affirmed.

Respectfully submitted,

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Attorneys for Appellee,
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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Shelby R. Gott

SHELBY R. GOTT